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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES, INC., ET AL., APPELLANTS

v.

MARSHALL TRANSPORT COMPANY, WARREN C. MARSHALL, REFINERS TRANSPORT TERMINAL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion (R. 54–73) of the specially constituted district court is reported in 52 F. Supp. 1010. The reports of Division 4 of the Interstate Commerce Commission (R. 8–25) and of the full Commission (R. 26–35) appear in 39 M. C. C. 93 and 39 M. C. C. 271, respectively.

JURISDICTION

The final decree of the specially constituted district court was entered on November 1, 1943

(R. 75). The petition for appeal was presented on December 17, 1943 (R. 76–77), and the appeal was allowed on the same day (R. 79). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of Part II of the Interstate Commerce Act, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted on January 31, 1944 (R. 86).

QUESTIONS PRESENTED

The ultimate issue involved is the validity of the Commission's order of September 2, 1943 (R. 35), dismissing an application made under Section 5 (2) (a) and (b) of Part I of the Interstate Commerce Act for authority to a common carrier by motor vehicle to purchase the property and operating rights of another carrier by motor vehicle. The vendor and vendee carriers were the applicants. The Commission found that the vendor carrier was controlled through stock ownership by a non-carrier corporation. Construing Section 5 (2) (a) and (b) as requiring an application to be made by the non-carrier controlling corporation, it dismissed the application for lack of power to approve the purchase.

Subordinate issues are:

1. Whether the acquisition of all the property of another carrier by a carrier which is controlled by a non-carrier constitutes an acquisition of control of such other carrier by the non-carrier, for which the Commission's approval is required under Section 5 (2) (a) of the Interstate Commerce Act.

2. If so, whether the Commission properly held that it could not consider the validity of the transaction, in the absence of an application by the non-carrier company, under Section 5 (2) (b), for authority to acquire control.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 49–58.

STATEMENT

By joint application, appellees Refiners Transport & Terminal Corporation (hereinafter called Refiners) and Marshall Transport Co., Inc. (hereinafter called Marshall), both common carriers by tank truck,[1] sought authority from the Interstate Commerce Commission under the provisions of Section 5 (2) (a) of Part I of the Interstate

[1] Refiners carries petroleum, petroleum products, and certain other liquids in various midwestern states and also in Pennsylvania and West Virginia (R. 9). Marshall holds a certificate of public convenience and necessity to carry petroleum products over irregular routes from Baltimore, Maryland, to points in Delaware, Pennsylvania, and the Washington, D. C., commercial zone (R. 10).

Commerce Act for the former to purchase the property and operating rights of the latter. The proposed purchase also included certain automotive equipment and terminal properties of appellee Warren C. Marshall used by Marshall in the conduct of its operations. (R. 8, 10). Warren C. Marshall is president of Marshall and the owner of all its outstanding capital stock except two qualifying shares (R. 10).

A hearing was held upon the application at which nine motor carriers, now co-appellants, opposed the application. The Antitrust Division of the Department of Justice also intervened in opposition. Briefs were subsequently filed, an examiner's proposed report was issued to which exceptions were filed by the protestants, and the matter was argued before the Commission, Division 4. (R. 8–9.) On April 5, 1943, the Commission, Division 4, issued its report (R. 8–25) finding that the purchase by Refiners of the operating rights and property of Marshall, upon the terms and conditions set forth, was a transaction within the scope of Section 5 (2) (a) of Part I of the Interstate Commerce Act, and would be consistent with the public interest (R. 21–22). In thus deciding the application upon the merits, Division 4 overruled certain contentions of the protestants. Among these was the contention that this transaction would also result in the acquisition of control over Marshall by Union Tank

Car Company (hereinafter called Union), the non-carrier corporate parent of Refiners, within the meaning of Section 5 (2) (a) and that Union therefore was a necessary applicant for control authority under that Section.

With respect to the relationship between Union and Refiners, Division 4 found as follows (R. 14–15):

> *Refiners' organization.*—Refiners is the result of consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3 [R. 9]. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 per cent of its outstanding common capital stock, par value $10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 per cent of such outstand-

ing capital stock is owned by 10 stockholders, the largest block (approximately 22 per cent of the total outstanding) being held by the Rockefeller Foundation, of New York, N. Y. No stock is owned by a rail or water carrier, and only 100 shares thereof are owned by a motor carrier [Motor Express, Inc.]. It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latters' tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 per cent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer

> of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents.[2]

Upon petitions for reconsideration, the matter was submitted to the entire Commission (R. 26, 27). By report (R. 26–35) of August 3, 1943, the Commission reversed the holding of Division 4 with respect to the application of Section 5 (2) (a). It concluded (R. 31) that the proposed transaction was one wherein a person not a carrier, already controlling one carrier, Refiners, sought to acquire control, within the meaning of Section 5 (2) (a), of another carrier, Marshall. The Commission further held that under Section 5 (2) (b) this could not be done without an application for authority to do so having been filed with it by Union, the party in interest (R. 31, 32). Commissioners Porter and Miller, who had constituted the majority of Division 4, dissented (R. 32–35). In reaching its conclusion, the Commission incorporated and adopted (R. 27–28) the factual findings of Division 4 as quoted above.

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[2] Division 4 also held that Union is not "affiliated" with a railroad within the meaning of the proviso of Section 5 (2) (b), and that it is not a carrier by railroad (R. 20).

An order of dismissal was deferred for twenty days in order to afford an opportunity for Union to comply with the conclusion reached (R. 32). Union having failed to act within the period set, the Commission entered an order on September 2, 1943, dismissing the application (R. 35).

On or about September 10, 1943, the applicants before the Commission instituted suit in the United States District Court for the District of Maryland to set aside the order of dismissal (R. 1). The Interstate Commerce Commission and the several motor carrier protestants intervened (R. 38, 40). Final hearing was held before a specially constituted three-judge court on November 20, 1943.

The single issue before the district court was whether the Commission was authorized under Section 5 (2) (a) and (b) to refuse to hear and dispose of, on the merits, the application of Refiners and Marshall without the joinder of Union in the application (R. 60).

By opinion (R. 54–68) of District Judge Chesnut, filed October 16, 1943, a majority of the statutory court held that the non-carrier control clause of Section 5 (2) (a) was not applicable to the purchase by a non-carrier company's carrier subsidiary, of the property and operating rights of another carrier so as to disable the Commission from hearing and determining upon the merits the subsidiary's application for authority to pur-

chase without the formal joinder of the controlling corporation. In a dissenting opinion (R. 68–73), Circuit Judge Soper held that the Commission had properly construed the statute and that the joinder of the controlling corporation was a necessary condition to the grant of the authority sought.

The final decree, together with findings of fact and conclusions of law, was entered on November 1, 1943, annulling and setting aside the Commission's order of September 2, 1943, and directing the Commission to act upon the merits of the application (R. 74–76).

SPECIFICATIONS OF ERRORS TO BE URGED

The district court erred:

1. In holding that the conclusion reached by the Commission as to its authority and jurisdiction under Section 5 (2) (a) of Part I of the Interstate Commerce Act is not in accord with the intention of the statute to be gathered from its plain wording and from its historical development.

2. In holding that the "non-carrier control clause" of Section 5 (2) (a) is not restrictive of the Commission's authority to act under the "carrier purchase clause" of Section 5 (2) (a).

3. In holding that the application in this case was in fact made by the real party in interest within the statutory sense.

4. In holding that the Commission has authority to hear the application of Refiners and Trans-

port on the merits without the formal joinder of Union in the application.

5. In enjoining the dismissal order of the Commission of September 2, 1943, and enforcing by writ of mandatory injunction the Commission's jurisdiction of said application as filed with the Commission and directing the Commission to proceed to final disposition thereof on the merits.

6. In failing to dismiss the complaint.

SUMMARY OF ARGUMENT

I

Having found that Union, a non-carrier, controlled Refiners, a common carrier by motor vehicle, the Commission properly held that the attempted purchase by the subsidiary carrier of the property and rights of Marshall was within the purview of Section 5 (2) (a) as an acquisition by "a person which is not a carrier and which has control of one or more carriers" of the "control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (a) must be construed in the light of its context. It is apparent from a consideration of this paragraph of Section 5 and Section 5 as a whole that the word "control" wherever used is to be accorded the broadest scope possible. This is demonstrated by the broad definition of control in Section 1 (3) (b) where it is provided that "control" shall be construed to

mean "actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation * * * or through or by any other direct or indirect means." Also, paragraph (4) of Section 5, which paragraph complements paragraph (2) (a) thereof, forbids, except in the manner provided, the accomplishing or effectuating of "the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly * * * or in any other manner whatsoever." If, as seems plain, the acquisition by Union of Marshall through the instrumentality of its own creature will accomplish a control of the two carriers in a common interest within this broad language, the enabling provisions of paragraph (2) (a) should be given the application suggested by the Commission.

Such a construction is necessary to give effect to the purpose of Congress to subject non-carrier holding companies to certain provisions of the Act relating to carriers' reports, accounting, inspection of records, and the issuance of securities. Paragraph (3) of Section 5 makes non-carrier holding companies, to the extent provided by the Commission's order approving a carrier acquisition, subject to these provisions of the Act. This legislative requirement rests upon the public interest in the maintenance and preservation of an

adequate transportation system and the ability of the Commission to administer the Act to that end. Since the Commission is given discretion to determine the extent to which the requirements of the Act shall apply to holding companies, it seems logical that a similar latitude, within statutory limits, should be accorded the Commission in determining what companies have acquired "control." In this exercise of discretion, the form of control should not limit the Commission's powers. Where a holding company (Union) has in fact acquired control of a carrier (Marshall), an intent should not be attributed to Congress to exempt the holding company which acts through its carrier subsidiary (Refiners) in the purchase of another carrier (Marshall), while holding it subject to the special provisions of the Act if it should make the purchase itself.

The characteristics of the industry do not lend themselves to a construction of paragraph 2 (a) of Section 5 as being confined to forms of corporate control. Many motor carriers are owned by individuals or partnerships, control of which can only be passed by sale. Even when incorporated, the financial structures of such carriers are often quite simple and their stock closely held, thus making it more convenient to acquire property and operating rights by purchase rather than through stock ownership. Congress must be assumed to have taken into account these existing conditions when legislating.

The historical development of Section 5 supports the Commission's interpretation of paragraph (2) (a) thereof. The Transportation Act of 1920 inaugurated a new policy in railroad regulation. New provisions were thereby incorporated in the Interstate Commerce Act which had as their objective the fostering, developing and maintaining of efficient and adequate transportation service. Among them was the provision (sec. 5) for the approval by the Commission of the acquisition of control of one rail carrier by another where a consolidation into a single system for ownership and management was not involved. The Emergency Railroad Transportation Act of 1933 expanded this provision to include holding companies as such, and made such non-carriers subject to a prescribed regulatory control. The Motor Carrier Act of 1935 applied the same controls to motor carriers and to non-carriers where control was evidenced by stock ownership alone. Subsequently, the Transportation Act of 1940 enlarged the application of the statutory requirements with respect to acquisitions of control by non-carriers by defining control as used in Section 5 and adding the words "or otherwise" to the non-carrier control clause of paragraph (2) (a) thereof. The purpose of these additions was to make the determination of what constitutes an acquisition of control an administrative question. This affirmatively appears in the conference report on the

Transportation Act of 1940 where it was pointed out that the definition of control in Section 1 (3) (b) was made to accord with this Court's decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. In that case, it was held that the term "control" in the Federal Communications Act did not depend upon artificial tests and that the Commission's finding of control had administrative finality.

The district court's interpretation of the statute does not conform with the historical expansion of the Act and its over-all policy. It overlooks the public interest inherent in the adequacy of transportation service and rests upon the narrow base of corporate relationship.

II

Since the transaction here in issue was within the purview of the non-carrier control clause of paragraph (2) (a) of Section 5, the Commission could not give it validity without an appropriate application by the non-carrier controlling company.

While the language of Section 5 (2) (a) considered alone suggests permissive transactions, paragraph (4) of Section 5 specifically declares it to be unlawful for any person "to enter into any transaction within the scope of subparagraph (a)" without the Commission's approval. It does not suffice to say, as did the court below, that the re-

strictive effect of paragraph (4) expressly excepts those transactions authorized by paragraph (2) (a). If the present transaction falls within the non-carrier control clause (as well as the carrier purchase clause of paragraph 2 (a)), it never becomes a transaction which has received paragraph (2) approval unless the non-carrier makes an appropriate application to the Commission under paragraph 2 (b).

The development of the statute with respect to the consolidation of carriers confirms the mandatory effect of the present provisions of Section 5. While the Transportation Act of 1920 authorized the Commission to approve acquisitions of control, and consolidations and mergers, no prohibitory provisions comparable to paragraph (4) of Section 5 were enacted. Congress did not expressly provide that it would be unlawful for any person to effectuate a common control or management without the Commission's approval, until it passed the Transportation Act of 1933. However, it appeared in the House Report on the bill which was enacted as the 1933 Act, that the Commission's approval was to be a condition precedent to the legality of any transaction involving consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control. The Motor Carrier Act of 1935 enacted similar provisions with respect to motor carriers and in the enabling

provisions of Section 213 (a) significantly provided that the described transactions would be lawful upon the Commission's approval "but under no other conditions." The Transportation Act of 1940 consolidated in Section 5 provisions applicable in common to rail, motor and water carriers but continued in effect, with the amendments above adverted to, the enabling and prohibitory provisions with respect to consolidations, mergers, purchase, leases and acquisitions of control, and thus confirmed the mandatory character of proceeding under Section 5 (2).

ARGUMENT

I

THE COMMISSION CORRECTLY HELD THAT THE PHRASE "TO ACQUIRE CONTROL OF ANOTHER CARRIER THROUGH OWNERSHIP OF ITS STOCK OR OTHERWISE," AS EMPLOYED IN SECTION 5 (2) (a) OF PART I OF THE INTERSTATE COMMERCE ACT, INCLUDES THE PURCHASE OF THE PROPERTY AND OPERATING RIGHTS OF ANOTHER CARRIER

A. THE LANGUAGE EMPLOYED BY CONGRESS IN THE ENACTMENT OF SECTION 5 OF THE INTERSTATE COMMERCE ACT CLEARLY SHOWS THAT THE WORD "CONTROL" AS USED IN SECTION 5 (2) (a) IS TO BE READ IN A COMPREHENSIVE SENSE

Section 5 (2) (a) of Part I of the Interstate Commerce Act makes it lawful, with the approval and authorization of the Interstate Commerce Commission as provided in Section 5 (2) (b):

> for any carrier * * * to purchase * * * the properties, or any part there-

> of, of another; * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

Section 5 (2) (b) provides that whenever a transaction is proposed under subparagraph (a), the carriers or persons seeking authority therefor "shall present an application to the Commission."

The issue here turns, as it did before the Commission and the court below, upon the construction of the "non-carrier control" clause of Section 5 (2) (a).[3] In applying the statute to the application before it, the Commission held that Union, which concededly controls Refiners in the statutory sense, was attempting to acquire control of a second motor carrier, Marshall, through purchase by its subsidiary Refiners of Marshall's

[3] Section 5, as amended by the Transportation Act of 1940, deals with "Combinations or Consolidations of Carriers" and, under Section 5 (13), is applicable to all types of carriers with which Parts I, II, and III of the Interstate Commerce Act deal. In paragraph (2) (a) of Section 5, five transactions are named which are made lawful with the approval and authorization of the Commission. Among them are, (a) the purchase by one carrier of the properties of another, and (b) the acquisition of control of another carrier through ownership of its stock or otherwise by a non-carrier which has control of one or more carriers. These will be referred to as the "carrier purchase" clause and "non-carrier control" clause.

property and operating rights[4] and that the transaction fell within the phrase "or otherwise", as found in subparagraph (a), *supra*. This interpretation finds support in a consideration of the compass of Section 5, which discloses the manifest desire of Congress to accord the word "control" wherever used the broadest scope possible.

Appellants[5] do not assert, as the district court seemed to think (R. 61), that the non-carrier control clause of Section 5 (2) (a) must be construed as superseding the express authority granted to the Commission in the carrier purchase clause, but only that this same transaction falls within both clauses.

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[4] Other proceedings involving acquisitions by Refiners of the property and operating rights of other carriers are:

Docket No.	Title	Status
MC-F-1951	Refiners Transport & Terminal Corporation—Purchase—Leander G. Tait.	Awaiting outcome of litigation involving R-1936.
MC-F-2034	Refiners Transport & Terminal Corporation—Control—The Collins Transportation Co., Inc.	Dismissed on petition 12/18/43.
MC-F-2059	Refiners Transport & Terminal Corporation—Merger—The Collins Transportation Co., Inc.	Dismissed on petition 12/18/43.
MC-F-2100	Refiners Transport & Terminal Corporation—Motor Fuels Transport, Inc.	Dismissed on petition 12/22/43.
MC-F-2128	Refiners Transport & Terminal Corporation—Purchase—W. T. Holt, Incorporated, and W. T. Holt.	Awaiting outcome of litigation involving F-1936.

[5] The term "appellants," as herein used, refers to the United States and the Interstate Commerce Commission.

Viewed solely in this light, as a question of whether this transaction falls within the non-carrier control clause, there is presented no problem of disregarding the corporate entity, or determining whether Refiners in making this purchase was acting as the *alter ego* of Union.* For such purposes, it is immaterial whether Union or Refiners is to be regarded as the party actually purchasing the property of Marshall, or that the property was purchased here by Union's subsidiary, Refiners, rather than directly by Union. If such purchase amounts to an acquisition of control of Marshall, as we submit it does, the ultimate result will be that Union will control Marshall just as if it had made the purchase directly, since it controls Refiners, and thus everything which Refiners controls. The fact that the property purchase here was not by Union directly is of no more significance in determining whether Union gained control than it would have been in the case of a stock purchase by Union's subsidiary. Plainly, if a stock purchase had been involved, it could not be questioned that Union would have

* Certain of the private appellants argued, *inter alia*, before the Commission and district court that, irrespective of whether this transaction fell within this statutory control clause, Refiners, in making this purchase, was merely acting as the *alter ego* of Union, the real party in interest. It was further argued that the Commission, as an incident of its general power over its procedure (sec. 204 (a) (6)), might compel such a party to file an application and appear before it.

secured control of Marshall whether Union purchased Marshall's stock directly, or through its corporate subsidiary, Refiners.

The broad language of the Interstate Commerce Act, as amended by the Transportation Act of 1940, clearly justifies the construction that control, as there understood, of a carrier can be accomplished through means other than acquisition of its stock, including acquisition of its property. In the first place, Section 5 (2) (a) refers to acquisition of "control of another carrier through ownership of its stock *or otherwise*" [italics supplied]. Similar sweeping language is contained in Section 1 (3) (b) of the Act which provides:

> For the purpose of section[s] 5 * * * of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, *or through or by any other direct or indirect means; and to include the power to exercise control* [italics supplied].

Complementing the provisions of Section 5 (2) (a) are those of paragraph 4 of Section 5, which declare it to be unlawful for any person to enter

into any transaction within the scope of subparagraph (a) of Section 5 (2), except as provided in paragraph (2), and which prohibit any person from accomplishing or effectuating, or participating in accomplishing or effectuating "the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, *or in any other manner whatsoever*" [italics supplied].[7] The words "control or management" are defined in paragraph (4) to include "the power to exercise control or management." It is difficult to imagine statutory language of wider import in defining "control" than here employed. A control that is obtained "in any manner whatsoever," "however such result is attained, whether directly or indirectly," "whether actual or legal," or whether active or potential, is a control forbidden unless the statu-

[7] It should be noted that the language used in Sections 5 (2) (a), 1 (3) (b) and 5 (4), as the Commission observed (R. 29), is much broader than that contained in Section 7 of the Clayton Act (15 U. S. C. 18), which this Court in *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 561, had construed as not covering control through acquisition of property. That Section provides in part:

> * * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, * * *.

tory requirements are satisfied. Here, through purchase by Refiners of Marshall's properties and rights, those two carriers are to be made one and placed under a single management and control. Union, as the holding company of Refiners, would thereby acquire direct control of the activities of Marshall as an integral part of a consolidated company. Plainly, it was intended that the reach of the enabling provisions dealing with non-carrier control (sec. 5 (2) (a) and (b)) should be treated as coextensive with the prohibitory provisions of paragraph 4.

The legislative design of the non-carrier control clause of paragraph (2) of Section 5 is disclosed in paragraph (3) thereof. It is there provided that where a non-carrier is authorized by an order entered under paragraph (2) to control any carrier or two or more carriers, such non-carrier, to the extent provided by the Commission in its order, shall be considered as a carrier subject to provisions (sec. 20, 20 (a)) of the Act dealing with annual and special reports, uniform systems of accounts, access of the Commission's representatives to records, and the issuance of securities and assumption of liabilities by carriers.* It should be noted that the Commission is given discretion in determining the extent to which

* As applied to carriers by motor vehicle, these provisions are to be found in Section 204 (a) (1) and (2), Section 220, and Section 214, Appendix, *infra*, pp. 55–58.

these specified provisions are to be applied to the non-carrier company.*

The powers given the Commission over the records and accounts and the issuance of securities of carriers, have behind them the public interest in the maintenance and preservation of adequate transportation systems and the ability of the Commission to administer the Act to that end. *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423; *Goodrich Transit Co.* v. *Interstate Commerce Commission*, 224 U. S. 194; *Pittsburgh & W. V. Ry. Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001 (App. D. C.), appeal dismissed, 266 U. S. 640. But the extent to which these restrictions shall be imposed upon non-carrier holding companies has been left to the Commission's determination. Having given the Commission this latitude of action, it is reasonable to assume that Congress meant that it should be exercised whatever might be the form of "control."

No one can gainsay that, as the Commission stated, "there can be no more direct or positive manner of obtaining control than by outright purchase" (R. 30). If such type of control is acquired, the broad definition of control (sec. 1 (3)

* Section 214 may be an exception. Considered alone, it seems to make mandatory the necessity for the Commission's approval of the issuance of securities or the assumption of indebtedness.

(b)), coupled with the discretion vested in the Commission to render the holding company amenable to the special limitations, obviously sustains the Commission's action.[10] It would be incongruous to attribute to Congress an intent to exempt the holding company which acts through its carrier subsidiary in the purchase of another car-

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[10] The characteristics of the industry support the practicality of this interpretation. As the Commission pointed out (R. 30):

> * * * As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities outstanding evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills, etc. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It often is quite simple under these circumstances to acquire for cash the "assets," including certificate and goodwill, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of "control" as used in the Act.

rier, while holding it subject to the special provisions of the Act whenever making the purchase directly.

The enactment of the Motor Carrier Act of 1935 was preceded by exhaustive studies of the motor carrier industry. Subsequent amendments, including the addition of the words "or otherwise" to the noncarrier control clause of Section 5 (2) (a), by the Transportation Act of 1940, must be taken to have resulted from practical experience in regulation and to have been designed to facilitate the objectives of the Act as exemplified in the declaration of policy (Appendix, *infra*, p. 49). The inherent characteristics of the industry being known to Congress, it must be assumed that the wording of Section 5 was chosen to fit conditions as they existed.

It should be remembered, too, that Congress has not authorized the Commission in passing upon a proposed merger under Section 5 to ignore the policy of the antitrust laws. *McLean Trucking Co., Inc.*, v. *United States*, No. 31, this Term, decided January 17, 1944, pamphlet, p. 14. Thus, it is appropriate, in construing Section 5, to note that the courts have never drawn any distinction, when considering the validity of an alleged monopoly under the Sherman Act, as to whether the offending corporation acquired control of its competitors through purchase of their stock or through purchase of their assets. See, *e. g.*,

United States v. *American Tobacco Co.*, 221 U. S. 106, 158–163; *United States* v. *Pullman Co.*, 50 F. Supp. 123, 126 (E. D. Pa.).[11]

It is idle to assert, as appellees no doubt will, that because Marshall will cease its operations and cease to be a carrier after this transaction is completed, Union cannot be said to be acquiring control of "another carrier" within the meaning of Section 5 (2) (a). This unduly legalistic argument overlooks the fact that the Act is concerned primarily with whether the company to be acquired is a carrier at the time the transaction is proposed, not with whether it will be technically a carrier when the transaction has been carried to fruition. This is manifested by the requirement that the Commission's approval be given before the transaction is carried out. Moreover, appellees' same argument would apply equally if the present transaction is considered merely a purchase of Marshall's property by Refiners under the first (carrier purchase) clause of Section 5 (2) (a). The fact that Marshall would

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[11] This Court remarked in *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 561, that—

> If purchase of property has produced an unlawful status a remedy is provided through the courts. Sherman Act, c. 647, 26 Stat. 209; * * *.

cease to be a carrier after all its property and operating rights had been sold would be just as fatal, under appellees' theory, to the Commission's jurisdiction under the first clause since that clause applies only to purchases of the "properties, or any part thereof, *of another* [*carrier*]" [italics supplied]. Nevertheless, appellees do not question the Commission's jurisdiction over this transaction if viewed merely as a carrier's purchase of property.

The district court thought that the statute was aimed mainly at preventing unfair domination and management of one carrier for the advantage of another, and that such a condition could exist only when there are two going carriers (R. 65–66, 68). This purpose was said to be manifest in paragraph (6) of Section 5 of the Act (R. 65). But that paragraph contains merely a definition of a "person affiliated with a carrier" and provides that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier * * *, it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." It does not purport to define "control." While the purpose mentioned is un-

doubtedly one of the purposes of Section 5, it is scarcely the only one or even the main one. Rather, from the breadth of the transactions enumerated in Section 5 (2) (a), and from the fact that Section 5 (11) exempts persons participating in those transactions approved by the Commmission from the prohibitions of the anti-trust laws, it is evident that Congress sought to subject all transactions having a tendency to promote concentration of economic power in the transportation field to the approval of the Commission. In the light of this broad purpose, considerations of substance must be valued over those of form, and the fact that Marshall will cease to be a carrier after this transaction is completed cannot be regarded as of any crucial significance.

B. THE HISTORICAL DEVELOPMENT OF SECTION 5 CONFIRMS THE CORRECTNESS OF THE COMMISSION'S INTERPRETATION

The historical development of the provisions of the Interstate Commerce Act dealing with various forms of acquisition of control over carriers indicates a constantly broadening concept of "control," and, as the district court admitted (R. 65), a "consistent progressive congressional policy in broadening the authority of the Commission to deal with various types of cases involving control."

The new policy for transportation regulation inaugurated in the 1920 Act (*New England Divisions Case,* 261 U. S. 184, 189) was designed in order further to assure adequacy in transportation service. *United States* v. *Lowden,* 308 U. S. 225, 230; *N. Y. Central Securities Co.* v. *United States,* 287 U. S. 12, 24. This emphasis took a wide range. Among the new provisions were those placing new securities under the control of the Commission; the provision for the consolidation of railroads into a limited number of systems; and provisions for securing adequate car service and giving the Commission control over the extension and abandonment of railway lines. All of these provisions spoke in terms of service.

Section 5 of the 1887 Act, as amended by the 1920 Act (41 Stat. 456, 480–482), gave the Commission authority to approve the acquisition of control by one carrier over another carrier "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation," where the Commission found that such transactions would be in the public interest. Section 5 also relieved carriers from liability under the antitrust laws in carrying out

such acquisitions of control, where the Commission had approved the transaction. But the Commission's authority, as defined in the statute, was made applicable only to acquisitions by carriers. When, therefore, non-carrier holding companies were utilized for the unification of carrier properties, the Commission found itself without jurisdiction.[12] Widespread use of the railroad holding company device and need for its regulation led to the amendments made in Section 5 by the Emergency Railroad Transportation Act of 1933[13] (48 Stat. 211, 217–220). Section 5 (4), as amended by that Act, made it lawful with the Commission's approval, for a corporation which was not a carrier and which had control of a carrier to acquire control of another carrier through ownership of its stock. Congress, however, having legitimized (sec. 5 (4)) this method of securing control, made it unlawful[14] to accomplish control or management in a common interest of any two or more carriers by various other named devices or "in any other manner whatsoever" (sec. 5 (6)), as amended.[15] By Section

[12] *Stock of Denver & Rio Grande Western R. R.*, 70 I. C. C. 102, 105; see Sharfman, *The Interstate Commerce Commission* (1935), Vol. III A, p. 439.

[13] See Sharfman, *op. cit.*, 439–442; H. Rep. No. 193, 73rd Cong., 1st sess., pp. 19–20; see also Annual Report of the Interstate Commerce Commission, 1932, p. 25.

[14] Formerly, the only possible barrier to acquisition of control was the antitrust laws. See, *e. g.*, *Northern Securities Co.* v. *United States*, 193 U. S. 197.

[15] See S. Rep. No. 87, 73rd Cong., 1st sess., p. 9.

5 (5), the Commission was also authorized, when approving the acquisition of control of carriers by non-carriers, to subject the non-carriers, just as if carriers, to certain regulatory provisions of the Act relating to reports, accounts, and the issuance of securities. The 1933 Act, furthermore, amended Section 5 in order to require approval by the Commission of purchases of the property of one carrier by another carrier (sec. 5 (4)).[16] Substantially these same provisions were carried over with respect to acquisitions of control of motor carriers into Section 213 of the Motor Carrier Act of 1935 (49 Stat. 543, 555–557). Again, with the Commission's approval, non-carriers controlling a carrier were permitted to acquire control of another carrier "through ownership of its stock."

To this point, only the acquisition of control by non-carriers through stock purchase was legalized, when accomplished with the Commission's approval. But the Transportation Act of 1940 (54 Stat. 898), besides combining the provisions dealing with acquisition of control of all types of carriers in a new Section 5, completely removed the restrictions as to the types of acquisition of

[16] Previously, the Commission had taken the view that its approval of the purchase of the property of one carrier by another carrier was required only under Section 1 (18), which necessitates a certificate of public convenience and necessity. *Acquisition by Pittsburgh & W. Va. Ry. Co.*, 150 I. C. C. 81, 84; Sharfman, *op. cit.*, 445–446.

control which could lawfully be accomplished with the Commission's approval. In the first place, Section 5 (2) (a) was amended by adding the phrase "or otherwise," thereby making that Section read:

> It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock *or otherwise* [italics supplied].

Congress clearly intended this language to mean just what it says and to give the Commission authority to approve all methods of securing control, even by methods other than stock ownership. Thus, the conference report says of this change, which was made in conference (H. Rep. No. 2832, 76th Cong., 3rd sess., p. 68):

> 1. Paragraph (2) is changed by adding the words "or otherwise" in several places, so that acquisitions of control by methods other than through ownership of stock is authorized with Commission approval.

The addition of Section 1 (3) (b) by the Transportation Act of 1940 also clearly indicates the Congressional intent to include within the purview of Section 5 (2) (a) all means by which control of a carrier may be acquired. Section 1 (3) (b), heretofore quoted (*supra*, p. 20), provides that

control, as used in Section 5 and other Sections, shall be construed to include actual as well as legal control, whether exercised through circumstances surrounding organization or operation, through common directors, officers or stockholders, voting trusts, holding companies, "or through or by any other direct or indirect means." As Circuit Judge Soper indicated in his dissenting opinion (R. 71), the conference report[17] shows that Congress used this broad language advisedly, mindful of the broad interpretation which had but

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[17] H. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63, states:

Section 2 (b). Definition of Control:

This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of "control" which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term "person" is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1 (1) (a) and section 15 (4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase "controlling, controlled by, or under common control with" a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp.* v. *United States* (307 U. S. 125, decided April 17, 1939).

recently been placed by this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, upon the definition of control in Section 2 of the Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. 152 (b)). There, this Court had said (307 U. S. 125, 145–146):

> The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Swayne &*

Hoyt, Ltd., v. *United States*, 300 U. S. 297, 303, *et seq.*[18]

The Commission in the instant case has found that Union was, through its subsidiary carrier, Refiners, attempting to acquire control of another carrier, Marshall. The method adopted to effectuate that purpose would ultimately result in the extinction as a legal entity of Marshall, the carrier to be purchased. But the service heretofore rendered by Marshall would be continued by Refiners and would in turn be subject to the control of Union. The Commission held this scheme to be the acquisition of control within the statutory language. In so doing, it was not exercising a mere fact-finding function but was acting as the duly constituted expert body called

[18] In support of its conclusion that Congress did not have in mind artificial tests of control, the Court (307 U. S. 125, 145) cited H. Rep. No. 1850, 73rd Cong., 2nd sess., pp. 4–5, where it was said:

> * * * No attempt is made to define "control," since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors.

upon by Congress to give full implementation to the carrying out of the National Transportation Policy. See *Gray* v. *Powell*, 314 U. S. 402, 412; *Helvering* v. *Clifford*, 309 U. S. 331, 336; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145. The question of what constitutes control within the meaning of Section 5 (2) (a) is, of course, a matter for determination by the administrative body whose conclusion must be sustained when it rests upon a rational basis. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287.

The court below stated (R. 65) that the construction of the statute adopted by the Commission is not necessary in the public interest in the regulation of carriers. Aside from overstepping its function in such a declaration, the court has taken too narrow a perspective of the purpose of Section 5 in general and paragraph (2) (a) thereof in particular. It is not enough to say that the main purpose of the statute was to prevent unfair domination and management of one carrier for the advantage of another, and, therefore, when the application is made by a subsidiary of a non-carrier for authority to purchase another carrier, that the Commission by imposing conditions can preserve the integrity and efficiency of the separate carriers to the extent necessary for the public interest. The public interest goes beyond the interests of the investors in the par-

ticular carriers involved. Conceivably, a proposed purchase may result in more expeditious and efficient service and savings that may make rate reductions possible, and, at the same time, destroy what theretofore has been competitive transportation services. In such a case, the Commission would be faced, under the lower court's construction, with the dilemma of having to deny to the public the benefits arising from the fusion of the two companies or of authorizing the merger under a common control upon which it could not impose the statutory restraints which Congress deemed necessary where a non-carrier controls the service of two legally separate carriers. It is thus readily apparent that the need for the regulation of the non-carrier holding company, as Congress declared (see pp. 30–31, *supra*), does not vary in accordance with the particular method by which control is obtained.

II

SINCE THE TRANSACTION WAS WITHIN THE PURVIEW OF THE NON-CARRIER CONTROL CLAUSE OF SECTION 5 (2) (a), THE COMMISSION PROPERLY HELD THAT IT COULD NOT PROCEED TO CONSIDER ITS VALIDITY IN THE ABSENCE OF AN APPROPRIATE APPLICATION BY THE NON-CARRIER

The court below construed Section 5 (2) (a) as authorizing the Commission to act in any one of several permissive situations (R. 62). It held that the provision for the purchase by one car-

rier of the property and operating rights of another was independent of the non-carrier control clause, so as to compel a decision on the merits by the Commission upon the application of merely the carrier (R. 62). This conclusion, we submit, cannot be sustained, for it was reached by erroneously focusing attention merely upon paragraph 2 (a) of Section 5 to the exclusion of the language of other paragraphs of that Section. These other paragraphs, read in their historical setting, make it abundantly clear that as to any transaction within the ambit of the non-carrier control clause of Section 5 (2) (a), the securing of the Commission's approval upon the application of the non-carrier is mandatory rather than permissive.

Section 5 (2) (a) provides that it shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b), for the described transactions to be accomplished. But paragraph (4) conversely declares it to be unlawful for any person "to enter into any transaction within the scope of subparagraph (a)" of paragraph 2 except as provided in paragraph (2). Paragraph (2) (b) provides that "whenever a transaction is proposed under subparagraph (a), the carrier or carriers *or person seeking authority* therefor *shall present an application to the Commission*" [italics supplied]. Thus, while subparagraph 2 (a) alone is couched in permissive language, the subsequent paragraphs negative the

legality of any of the transactions there specified which have not been approved by the Commission in accordance with the procedure prescribed in Section 5 (2) (b). And one of the requirements of that procedure is that the person seeking authority shall present an application.

The court below sought to dismiss the restrictive effect of Section 5 (4) by stating (R. 62) that paragraph 4 expressly excepts from transactions there made unlawful, those authorized under Section 5 (2) (a). But this statement ignores the fact that participation in transactions within the scope of Section 5 (2) (a) is excepted from illegality under Section 5 (4) only as provided in Section 5 (2). Section 5 (2), of course, also embraces Section 5 (2) (b), where the proper procedure is prescribed, and, as above stated, under this procedure the person seeking authority must file an application. Thus, if the present transaction falls within the non-carrier control clause (as well as the carrier purchase clause) of Section 5 (2) (a), then Union could not, by virtue of Section 5 (4), lawfully participate therein without securing the Commission's approval in the method set forth in Section 5 (2) (b). Union would clearly be a "person seeking authority therefor" within the meaning of Section 5 (2) (b), and by that Section would be required to present its application. For the Commission to have approved this transaction without Union's

application being on file, would have been to countenance Union's participation in a transaction in derogation of the statute.

The historical development of the statutory provisions with respect to unification and consolidation of carriers, contrary to the views of the court below, also clearly demonstrates that the securing of the Commission's approval, in accordance with the prescribed procedure, of participation in any transaction within the purview of such provisions is mandatory and not permissive.

As we have seen, with the passage of the Transportation Act of 1920, the Commission was given authority to permit the consolidations and mergers of rail carriers (41 Stat. 480). By that Act, the Commission was charged with the duty of preparing a plan for the consolidations of railroads. It was also empowered to approve, when in the public interest, the acquisition by one carrier of the control of another carrier in any manner not involving the consolidation of such carriers into a single system for ownership and operation.[19]

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[19] Section 5 (2) provided (41 Stat. 481):

Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in

No prohibitory provisions comparable to paragraph (4) were, however, enacted. These provisions[20] remained in effect until the enactment of the Emergency Railroad Transportation Act of 1933. That Act authorized consolidations and mergers, purchases, leases, and acquisitions of control upon application to the Commission and its finding "that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest" (48 Stat. 217). As stated above, acquisitions of control through stock ownership by non-carrier corporations were included and such non-carriers made subject to Section 20 and 20 (a) to the extent provided by the Commission. The Act further stated that "the carrier or carriers or corporation seeking authority therefor shall

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the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

[20] As to the permissive character of these provisions, compare *Snyder* v. *N. Y., C. & St. L. Rd. Co.*, 118 Ohio St. 72, affirmed, 278 U. S. 578, *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360.

present an application." A new paragraph (6) declared it to be unlawful for any person, except upon the approval of the Commission, to accomlish or effectuate the control or management in a common interest of any two or more carriers "however such result is attained, * * *" (48 Stat. 218). The district courts were given jurisdiction to enjoin violations of the provisions of Section 5 or any order by the Commission thereunder (48 Stat. 219).

That Congress intended by these amendments to remove any doubt that securing the Commission's approval under these consolidation provisions was mandatory is evidenced by the following statement in the report of the House Committee on Interstate and Foreign Commerce (H. Rep. No. 193, 73rd Cong., 1st sess., p. 16):

> A means having been furnished under paragraph (4) by which consolidations, mergers, purchases, leases, operating contracts, and acquistions of control may be effected, it is intended by this paragraph [par. 6] to prevent consolidations, unifications, common controls, and common managements being effected, in the future, otherwise than as authorized in such paragraph (4), it being the intention that the Interstate Commerce Commission shall have an opportunity to pass upon such matters in order that transactions resulting in combinations and controls of carriers may be accomplished in an orderly manner, with

due regard to the consolidation plan and the public interest. * * *

The Motor Carrier Act of 1935, 49 Stat. 543, 555, dealt separately with consolidations, mergers, and acquisitions of control of motor carriers. Section 213 (a) provided that "it shall be lawful, under the conditions specified below [application to the Commission, hearing, findings of public interest, etc.], *but under no other conditions*" [italics supplied], for a motor carrier to purchase, lease, acquire control, etc., of another motor carrier and for non-carriers, controlling one or more motor carriers, to acquire control of another motor carrier through ownership of its stock. This paragraph also provided that the "carrier or carriers or the person seeking authority therefor shall present an application." Section 213 (b) (1) made it unlawful for any person, except as provided by subparagraph (a), to accomplish or effectuate the common control or management of any two or more motor carriers. These provisions were clearly a counterpart of the provisions of Section 5 dealing with rail carriers (*McLean Trucking Co., Inc.* v. *United States*, No. 31, this Term, decided January 17, 1944, pamphlet p. 12), and it is plain that all the provisions of the 1933 Act making the securing of the Commission's approval compulsory, were carried over in the Motor Carrier Act.

The Transportation Act of 1940 consolidated in Section 5 common provisions dealing with con-

solidations, mergers, purchases, and the like, of rail, motor, and water carriers. 54 Stat. 905. Again, all the provisions which made the securing of the Commission's approval mandatory, were preserved. At the same time, the words "or otherwise," above discussed (p. 32, *supra*), were added to the non-carrier control clause of Section 5 (2) (a). And finally, by paragraph (11) it was provided that the Commission's authority under Section 5 "shall be exclusive and plenary." 54 Stat. 908.

This evolution of Section 5 likewise demonstrates, as Judge Soper observed (R. 68), that "each extension of the Commission's power to permit consolidations has involved also the extension of its power to secure and exercise regulatory control." The Commission's refusal to consider the present transaction on the merits without having the application of the non-carrier before it, is not at all inconsistent with this broad purpose or restrictive of the Commission's powers, as the majority of the district court seemed to think (R. 65). The insistence upon an application by the non-carrier is no idle formality, but instead is necessary to preserve in full vigor the broad regulatory powers granted the Commission over non-carriers who are permitted to acquire control of carriers. As has been pointed out, Section 5 (3) of the Act provides that "whenever a person

which is not a carrier is authorized by an order entered under paragraph (2) to acquire control of any carrier * * * such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control * * *." The provisions named, insofar as they are applicable to motor carriers, are Sections 204 (a) (1) and (2) and 220 (relating to reports, accounts, and so forth of carriers) and Section 214 (relating to issue of securities and assumptions of liability of carriers). Appendix, *infra*, pp. 55–58. The Commission, as it is empowered to do under Section 5 (3), might have determined that none of these provisions need be applied to Union. That is unimportant. The statute gives the Commission power to determine to just what extent a non-carrier making such an application is to be treated as itself a carrier. But Union, through its failure to file an application and have this transaction approved by order, was attempting to deprive the Commission of its jurisdiction under this Section to make the proper determination with respect to it. The district court independently sought to determine how far these regulatory provisions need be made applicable to Union, and concluded (R. 65–66) that in view of the application by the carrier (Refiners),

the Commission would have full and complete authority to the extent of the public interests involved. But since the statute gave the Commission "exclusive and plenary" (sec. 5 (11)) power to decide this complicated and technical question, the court under the "primary jurisdiction" doctrine exceeded its authority in assuming to make this determination in the first instance. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 431-433; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195.

Another reason appears why it was appropriate that Union be an applicant before the Commission. Section 5 (2) (b) provides that the Commission may attach reasonable terms and conditions to any order approving a transaction. Obviously, the Commission could not validly address any such order or conditions to Union if Union was not even a party before it having had an opportunity to be heard. Yet in view of Union's paramount interest in the railroad tank car business and the resultant possibility that it might operate the motor tank truck business sought to be acquired, in the private interests of its competing railroad clients rather than of the public, the Commission, on the merits, might very well have found it ap-

propriate to make certain conditions applicable to Union.

Presumably, it will be urged by appellees that the present insistence upon the application of the controlling non-carrier in a carrier purchase case is inconsistent with the Commission's past practice. But while the Commission's previous regulations [21] had not required an application by the controlling non-carrier in a carrier purchase case, and while the Commission had admittedly approved many such purchases without the non-carrier's application, still it does not appear that the question had ever been specifically raised before. In any event, no amount of administrative precedent or regulations can justify, at least for prospective application, the wrong construction of a statute. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280; *Interstate Commerce Commission* v. *Railway Labor Ass'n*, 315 U. S. 373 380. We submit that the Commission's present construction of the Act is the only one permissible under the Act.

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[21] See 5 Fed. Reg. 4698. By an order issued on September 17, 1943 (8 Fed. Reg. 13193–94), subsequent to the decision in the present case, these regulations have been amended so as to require the controlling non-carrier to be made a party to any carrier application to purchase the property of another carrier or acquire control over it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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APPENDIX

The Interstate Commerce Act, as amended by the Act of September 18, 1940, 54 Stat. 899, sets forth the National Transportation Policy as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U. S. C. 1.)

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (3) (b) provides:

> For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. (49 U. S. C. 1 (3) (b).)

Section 5 (2) provides in part:

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through owner-

ship of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a

carrier by railroad subject to this part, or any person which is controlled by such a carrier or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. (49 U. S. C. 5 (2).)

Section 5 (3) (a) provides:

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2)

and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest. (49 U. S. C. 5 (3).)

Section 5 (4) provides:

It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory

paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management. (49 U. S. C. 5 (4).)

Section 5 (11) provides:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to en-

able them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (49 U. S. C. 5 (11).)

Section 5 (13) provides:

(13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III. (49 U. S. C. 5 (13).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 204 (a) provides in part:

It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (49 U. S. C. 304 (a).)

Section 214 provides:

Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the par value of the securities to be issued, together with the par value of the securities then outstanding, does not exceed $500,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $100,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of their issue: *Provided further,* That the exemption in

section 3 (a) (6) of the "Securities Act, 1933," is hereby amended to read as follows: "(6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;". (49 U. S. C. 314.)

Section 220 provides in part:

(a) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this part. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided,* That if it appears from an examination of any such contract that it fails to conform to the published schedule of the

contract carrier by motor vehicle as required by section 218 (a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof. (49 U. S. C. 320.)

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